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Equity Security Holders Of USA Capital First Trust Deed Fund, LLC

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA**

In re: ) BK-S-06-10725-LBR  
USA COMMERCIAL MORTGAGE COMPANY, ) Chapter 11  
Debtor. )

In re: ) BK-S-06-10726-LBR  
USA CAPITAL REALTY ADVISORS, LLC, ) Chapter 11  
Debtor. )

In re: ) BK-S-06-10727-LBR  
USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, ) Chapter 11  
Debtor. )

In re: ) BK-S-06-10728-LBR  
USA CAPITAL FIRST TRUST DEED FUND, LLC, ) Chapter 11  
Debtor. )

In re: ) BK-S-06-10729-LBR  
USA SECURITIES, LLC, ) Chapter 11  
Debtor. )

Affects )

- ☒ All Debtors )  
☐ USA Commercial Mortgage Co. )  
☐ USA Securities, LLC )  
☐ USA Capital Realty Advisors, LLC )  
☐ USA Capital Diversified Trust Deed )  
☐ USA First Trust Deed Fund, LLC )

Date: October 25, 2006  
Time: 9:30 a.m.

**FTDF COMMITTEE STATEMENT IN SUPPORT OF MOTION FOR ORDER  
SCHEDULING AN AUCTION FOR THE SALE OF CERTAIN ASSETS, APPOINTING  
SPCP, LLC AS LEAD BIDDER, AND APPROVING BID PROCEDURES AND  
PROTECTIONS (AFFECTS ALL DEBTORS)**

1 **TO THE HONORABLE LINDA B. RIEGLE, UNITED STATES BANKRUPTCY JUDGE:**

2           The Official Committee of Equity Security Holders of USA Capital First Trust  
3 Deed Fund, LLC (the "FTD Fund Committee") appointed in the above-captioned bankruptcy  
4 cases (the "Chapter 11 Cases"), files this statement (the "Statement") in support of the "Motion  
5 for Order Scheduling an Auction for the Sale of Certain Assets, Appointing SPCP Group, LLC,  
6 as Lead Bidder, and Approving Bid Procedures and Protections" (the "Bid Procedures Motion")<sup>1</sup>,  
7 filed by USA Commercial Mortgage Company ("USACM"), USA Capital Diversified Trust  
8 Deed Fund, LLC ("DTD Fund"), USA Capital First Trust Deed Fund, LLC ("FTD Fund" and  
9 together with the DTD Fund, the "Funds"), USA Capital Realty Advisors, LLC ("Realty  
10 Advisors"), and USA Securities, LLC ("USA Securities" and collectively with USACM, DTD  
11 Fund, FTD Fund, and Realty Advisors, the "Debtors"), and respectfully represents as follows:

12 **I.**

13 **INTRODUCTION**

14           At the October 19, 2006 hearing, the Court expressed concerns regarding the sale  
15 process and sequencing of sale and plan proceedings. As alluded to in open court, the issues  
16 raised by the Court are largely the same issues which the parties have taken into account in their  
17 significant and ongoing negotiations. While it is seldom that the Court is exposed to the process  
18 by which the "sausages" are made, in this case it is important that the Court be aware of the  
19 substantial input of the various constituencies. In particular, a discussion of the various assets  
20 available for sale, the continued administrative burden of operating the cases, and the risks and  
21 expenses of both the sale process and the confirmation process have been painstakingly  
22 considered by the Debtors and the four official committees appointed in the Chapter 11 Cases  
23 (the "Committees").

24           Throughout the last several months, the Debtors and the Official Committees have  
25 entered into significant discussions regarding the most effective "exit strategy" for this case. As  
26 the Court is aware, this process presents unique challenges in that the Debtors are represented by

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27  
28 <sup>1</sup> Terms not otherwise defined herein shall have the same meanings ascribed to them in the Bid Procedures Motion.

1 joint management and counsel. However, the presence of four Official Committees has  
2 provided the opportunity to ensure that each of the constituencies is independently represented at  
3 the settlement table. Among the considerations taken into account during these discussions are  
4 the following:

5           1.       USACM holds little in the way of saleable assets. This Debtor's physical  
6 assets consist mainly of used office equipment and computer systems. While the Debtor is  
7 attempting to gain value from a "sale" of its servicing rights, significant challenges are posed by  
8 the fact that, once the contracts are transferred, lenders continue to have the right to replace the  
9 servicer with a substitute servicer thereby severely discounting the value of such servicing rights;  
10 and the cash flow stream from the loans is expected to continue to decline and potentially turn  
11 negative in the short term as the performing loans, or "low hanging fruit", have largely been  
12 collected by current management, resulting in the probability of increased collection costs and  
13 lower collection rates on a go forward basis.

14           2.       Realty Advisors has virtually no assets. While it purportedly acts as the  
15 "manager" for the two funds, its failure to prevent, disclose or remedy USACM's prepetition  
16 misconduct leaves that entity open to significant claims, including breach of fiduciary duties to  
17 the two Funds.

18           3.       USA Securities has no saleable assets. This entity was utilized as a  
19 vehicle to sell interests in the funds.

20           4.       The DTD Fund has a large principal balance portfolio, but the apparent  
21 lack of marketability of its assets is such that, while offers and expressions of interest for the  
22 DTD Fund assets were received, the proposed price was so low that the DTD Fund Committee  
23 determined that its constituency was better served by retaining both the portfolio and the various  
24 causes of action, including significant claims against insiders and affiliates.

25           5.       Finally, the Debtors and the Committees (in various combinations) have  
26 worked diligently to negotiate an exit strategy which manages the interlocking puzzle pieces of  
27 these estates in a manner which creates the greatest synergy and value for all of the entities.  
28 Among the give and take issues which comprise this process are a consideration of:

1 a. The extent to which each estate will bear the administrative burden  
2 of paying the Debtors' professionals.

3 b. The extent to which each of the Funds and the Direct Lenders will  
4 pay a servicing fee in excess of the 1% historically charged.

5 c. The extent to which the Funds will be charged or refunded.  
6 management fees charged by Realty Advisors (and immediately passed through to USACM).

7 d. The compromise of the USACM asserted rights to set off or recoup  
8 prepetition overpayments, as well as the use of such recovered monies in the overall  
9 reorganization.

10 e. The extent to which the various entities will fund a litigation "war  
11 chest" with which to pursue causes of action, as well as the allocation of recoveries from such  
12 assets.

13 f. The extent to which both the burden of the bid protections and any  
14 increase in the bids will be allocated between USACM and the FTD Fund.

15 g. The extent to which an acquirer has the ability to consider  
16 additional Borrower funding, which would enhance the collectibility of existing loans, while  
17 lowering claims against the estate.

18 h. The apparent inability to reorganize these Debtors and the  
19 increased likelihood of the Debtors various estates falling into administrative insolvency the  
20 longer these proceedings continue without a prompt resolution.

21 Significant progress has been made on the settlement of these (and other issues),  
22 and it is anticipated that the Debtors will be filing an amended plan which reflects settlements of  
23 most, if not all, of these issues. Because resolution of these issues requires both a sale process  
24 and the confirmation of a plan, Debtors and the Official Committees have been diligently  
25 working to conclude both as quickly as possible. Like the chicken and the egg, neither can come  
26 first without the other being involved. However, the representatives of the affected creditors and  
27 investors have determined that it would be most expeditious to proceed on a dual track, with the  
28 auction to precede the confirmation. While there is a recognized risk that the sale requires

1 confirmation in order to close; the alternative of proceeding to confirmation without a purchaser  
 2 in place would create a greater risk -- both because of the difficulty of going forward with a plan  
 3 and disclosure statement without an identified buyer and terms (i.e. dividing the pie without  
 4 knowing whether there is one); and because the representatives appointed to weigh in on these  
 5 issues believe that it would be more costly and risky to go forward with confirmation first than to  
 6 go forward with sale first.

7 The FTD Fund Committee is hopeful that the discussion herein, as well as  
 8 supporting documents being filed by all affected groups, will assist the Court in appreciating the  
 9 attention that has been given to the intricacies of the integrated sale and confirmation process  
 10 necessary to extricate the creditors and investors from the dire situation in which they were  
 11 placed by prior management. While any approach has both costs and risks, the representatives of  
 12 each of the creditor and investor groups, along with the Debtors, have spent substantial effort and  
 13 given tremendous thought as to the complex and intertwining issues presented.

## 14 II.

### 15 THE PROPOSED SALE OF ASSETS

16 In order to put the Motion in proper context, the Court needs to understand which  
 17 assets are proposed to be sold and the price to be paid for such assets by the proposed Stalking  
 18 Horse bidder

#### 19 A. Assets for Sale.

20 In the time since the Motion was filed, USACM and FTD Fund (together, the  
 21 "Sellers"), DTD Fund, USA Securities, and Realty Advisors (the "Acknowledging Parties"), and  
 22 SPCP Group, LLC ("Silver Point"), entered into that certain Asset Purchase Agreement, dated as  
 23 of October 19, 2006 (the "APA"), which was submitted to the Court on the very same day.

24 Pursuant to the APA, Silver Point will purchase the following assets:

- 25 • FTD Fund's proportional interest in 44 different loans<sup>2</sup> (the "First Trust  
 26 Deed Fund Assets") for cash consideration of \$46 million, subject to  
 27 certain adjustments (the "First Trust Deed Fund Price"); and

28  
 2 The APA lists 46 loans, but two of the loans listed paid off subsequent to July 31, 2006.

- USACM's post-closing rights to service loans pursuant to the loan servicing agreements for the USACM portfolio and related personal property (the "Commercial Mortgage Assets" and together with First Trust Deed Fund Assets, the "Property") for cash consideration based on the future (i) collection of servicing fees, (ii) collection of default rate interest and (iii) other payments and obligations set forth in the APA (the "Commercial Mortgage Price").

**B. First Trust Deed Fund Price.**

The APA provides for a purchase price for the First Trust Deed Fund Assets of \$46 million, subject to certain adjustments.<sup>3</sup> Based on the current aggregate principal balance of \$63,539,756 for First Trust Deed Fund Assets, the base First Trust Deed Fund Price will yield a 72.4% return to the FTD Fund.

The APA contemplates different price adjustments with respect to the First Trust Deed Fund Price. First, the APA has built-in price adjustments that enhance the recovery to the FTD Fund to the extent that principal payments on FTD Fund loans are received after July 31, 2006 (the "Cut-Off Date") and the closing of the sale. These adjustments provide for a partial reduction in the purchase price (ranging from 65% to 95% of the principal collected) for each dollar of principal collected prior to the close of the sale. As the First Trust Deed Fund Price will be reduced by less than the amount of the principal actually received by the FTD Fund, the net effect of any principal pay downs on the First Trust Deed Fund Assets after the Cut Off Date will be an increase on the overall return to the FTD Fund.<sup>4</sup>

Second, the APA has another price adjustment mechanism in the event the

<sup>3</sup> The First Trust Deed Fund Price specified in the Offer Letter was modified to address certain issues regarding the First Trust Deed Fund Assets that came to light during Silver Point's due diligence process

<sup>4</sup> For example, assume that, between the Cut-Off Date and the close of the sale, the FTD Fund's proportionate share of the principal collected is a hypothetical \$10 million, which falls within the 85% adjustment level contained in the APA, instead of reducing the purchase price by the full \$10 million of principal collected, the purchase price would be reduced by only \$8,500,000 (i.e., 85% of \$10 million). The FTD Fund would retain the \$10 million collected, thereby increasing the recovery percentage from 72.4% to 74.75%.

1 reported principal balance of the First Trust Deed Fund Assets as of the Cut Off Date proves to  
 2 be inaccurate.<sup>5</sup> These adjustments will not be made on a dollar-for-dollar basis, but rather, will  
 3 be made according to the same "buckets" that are used to account for principal payments (i.e.,  
 4 ranging from 65% to 95%). These downward adjustments in the First Trust Deed Fund Price  
 5 will be netted against any amounts by which the reported principal balance of the First Trust  
 6 Deed Fund Assets as of the Cut Off Date proves to be too low.<sup>6</sup>

7 Finally, all parties agree that there are certain title issues regarding one of the  
 8 FTD Fund loans that require further development and analysis. To the extent that the Debtors  
 9 are able to resolve these issues by delivering an appropriate title policy endorsement, the First  
 10 Trust Deed Fund Price will be increased by \$250,000.

#### 11 C. Commercial Mortgage Price.

12 The APA provides that in exchange for the Commercial Mortgage Assets,  
 13 USACM will receive interests in the collection of annual servicing fees as set forth in section  
 14 2.2(b) and 7.2(b) of the APA and default rate interest on the FTD Fund loans up to an  
 15 approximate amount of \$550,000. This sum is comprised of (a) 50% of the first \$1,000,000  
 16 collected by Silver Point for annual servicing fees under the applicable loan servicing agreement  
 17 following reimbursement of all expenses incurred by Silver Point in connection with its  
 18 enforcement efforts and (b) 50% of the first \$100,000 collected of default rate interest accrued on  
 19 the FTD Fund loans as of the date on which the order approving the Sale becomes a final order  
 20 (the "Closing Date"). In addition, while offers were made for the pre-closing servicing rights,  
 21 USACM elected to retain all pre-close accrued servicing fees and related fees. Thus, after the  
 22 Closing Date, Silver Point will collect and pay over to USACM certain amounts, including (a) all  
 23 servicing fees accrued but unpaid as of the Closing Date and (b) all late charges and default  
 24

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25 <sup>5</sup> All parties recognize that Debtors' new management has done all that it could in  
 26 reconstructing the Debtors' records, but, in the end, Debtors' new management, like a chapter  
 27 7 trustee, cannot guarantee any of the records they have used in re-creating the Debtors'  
 records.

28 <sup>6</sup> Because the netting occurs on a "bucket by bucket" basis, the mechanic to implement this  
 concept became admittedly complicated and lengthy.

1 interest due, but unpaid, from borrowers as of the Closing Date, with the exception of the  
2 proportionate default interest in respect of the First Trust Deed Fund Assets. In addition, Silver  
3 Point will also perform certain services on behalf of USACM's estate to assist USACM in the  
4 collection of its other assets, which it has elected to retain, including exit fees, extension fees,  
5 and deferred origination fees, among others.

### 6 III.

#### 7 THE FTDF COMMITTEE SUPPORTS THE AUCTION AND SALE PROCESS

8 The FTDF Committee's decision to support the proposed sale to Silver Point  
9 pursuant to the terms of the Offer Letter (and now pursuant to the APA) is based on extensive  
10 analysis by the FTDF Committee and its professionals

#### 11 A. The Proposed Sale Transaction Subject to the Auction Process is in 12 the Best Interests of FTD Fund's Estate.

13 The FTDF Committee believes that proposed sale transaction, subject to the  
14 auction process, is in the best interests of the FTD Fund estate and provides for the best  
15 mechanism to maximize the recovery to the FTD Fund investors. In order to gain comfort as to  
16 the purchase price of the First Trust Deed Fund Assets, the FTD Fund Committee's professionals  
17 spent considerable time and effort evaluating the ultimate recovery on the FTD Fund assets on a  
18 standalone basis, the timing and cost of such recovery and the myriad of risks and uncertainties  
19 inherent in achieving such recovery. After evaluating the potential range of recovery values to  
20 the FTD Fund relative to the risks, costs and uncertainties associated with such potential  
21 recovery values, the FTD Fund Committee supported the purchase price agreed to by the Debtors  
22 for the purchase of the First Trust Deed Fund Assets for several reasons. First, the sale process  
23 eliminates the timing and collection risk inherent in the continued workout of the FTD Fund  
24 loans. Second, the sale process removes the dilution of recoveries to investors from the  
25 continued administrative burden associated with administering these Chapter 11 Cases and the  
26 costs of collection and work out of the FTD Fund loan portfolio. Third, the auction process and  
27 purchase price adjustments for principal collections prior to the close of the sale is likely to  
28 provide a higher recovery than that contained in the APA. Accordingly, the FTD Fund  
Committee believes that the proposed sales transaction, subject to the auction process, provides

1 the best means to maximize the value to the FTD Fund investors.

2 **1. The sale process eliminates the timing and collection risk**  
3 **inherent in the continued workout of the FTD Fund loans.**

4 As of August 31, 2006, approximately half of FTD Fund's loan portfolio is  
5 classified as being non-performing. The FTD Fund's options with respect to these non-  
6 performing loans are very limited and will likely require advancing significant funds to pursue  
7 collection efforts. The FTD Fund (along with Direct Lenders with shared interests in the FTD  
8 Fund properties) may be required to proportionately fund the costs related to the foreclosure and  
9 bankruptcy process, as well as the costs of the maintenance of the properties (including payment  
10 of current and, in certain cases, potentially past due property taxes) it holds an interest in prior to  
11 their disposition. As stated previously, the "low hanging fruit" has been picked in this case.  
12 Despite the Debtors' best efforts, the Debtors' estates are approaching administrative insolvency  
13 as the professional fees continue to mount and the performing loan cash flow stream continues to  
14 decline. As the number of non-performing loans exceeds the number of performing loans, the  
15 servicer will need to suspend distributions in order to build a war chest to begin collection  
16 activities on the increasing number of delinquent borrowers. Thus, we are rapidly approaching a  
17 point where the FTD Fund would have the choice of leaving the servicer with inadequate  
18 liquidity to complete its articulated objectives or advance funds to the servicer in excess of its  
19 pro rata allocation of such obligations.

20 Moreover, the collection efforts and related litigation would be complicated by  
21 the fact that the FTD Fund owns only partial interests in the vast majority of the First Trust Deed  
22 Fund Assets. Thus, the FTD Fund could not on its own negotiate settlements or compromises of  
23 non-performing loans. Before any loan servicer can accept a reduced principal payment as a  
24 payoff on a loan, it must first have consent from 100% of the Direct Lenders on such loan, which  
25 in the case of certain of the FTD Fund loans involves hundreds of Direct Lenders. All of the  
26 foregoing, significantly constrains the ability of the FTD Fund to workout these loans.

27 Further, a myriad of economic factors outside of the Debtors', or any other  
28 servicer's, control may impair the ultimate recovery on the FTD Fund loans including, but not  
limited to: (i) the lack of projected demand for projects financed by the FTD Fund loans, (ii) the

1 inability to refinance projects at par due to cash flow constraints in a market with increasing  
 2 interest rates, and (iii) a downturn in real estate values or tightening of credit standards from  
 3 potential lending sources.

4                   **2. The sale process eliminates the dilution of recoveries due to the**  
 5                   **continued administrative burden associated with the collection**  
                       **and work out of the FTD Fund loan portfolio.**

6                   The sale of the First Trust Deed Fund Assets eliminates the FTD Fund's  
 7 continuing obligation to fund burdensome administrative and collection costs. The FTD Fund  
 8 servicing agreement provide for a servicing fee of "up to 3%". Until July 2006, USACM elected  
 9 only to charge the FTD Fund a 1% servicing fee. Due to the USACM Committee's demand,  
 10 USACM is now holding back an additional 2% servicing fee from the FTD Fund. Furthermore,  
 11 many of the FTD Fund loans (since more than 50% are non-performing) will require significant  
 12 collection costs and foreclosure costs that will be deducted from the ultimate recovery on the  
 13 underlying loans. Additionally, if the FTD Fund or a trust entity were to remain in existence  
 14 after confirmation of a plan of reorganization, distributions to the FTD Fund members would be  
 15 depleted by the costs of the transition from bankruptcy as well as the future administrative costs  
 16 (including necessary professional fees) of operating the FTD Fund post-effective date. All of  
 17 these costs would be paid from the FTD Fund loan portfolio, thereby reducing the ultimate  
 18 recovery available for to FTD Fund members.

19                   **3. The auction process and the adjustments for principal**  
 20                   **collections prior to the close of the sale provide for a**  
 21                   **potentially higher recovery than contained in the Silver Point**  
                       **LOI.**

22                   While Silver Point was chosen by the Debtors as the "stalking horse" for the  
 23 auction process at a base price that was acceptable to the FTD Fund Committee, key to the FTD  
 24 Fund Committee's decision to support the sale transaction was the likelihood of overbids to be  
 25 obtained through an auction process. Accordingly, the Debtors continue to discuss with, and  
 26 market the sale of the Debtors' assets to, other parties, and there have been numerous expressions  
 27 of interest received to date with two parties "pre-qualified" as set forth in the Bid Procedures  
 28 Motion. The APA creates a "floor" for a process by which the FTD Fund can explore what these  
 assets will bring when exposed to the market. In fact, the mere fact that Silver Point has entered

1 into the APA is likely to attract more interest from other bidders in the proposed transaction by  
2 establishing the credibility of the value of the Property. Further, the FTD Fund Committee  
3 negotiated a favorable purchase price adjustment for the FTD Fund to the extent that principal  
4 payments are received prior to the Closing Date. With the sale of the First Trust Deed Fund  
5 Assets conditioned upon the completion of an auction process to facilitate the submission of  
6 higher bids for the First Trust Deed Fund Assets and a purchase price adjustment mechanism in  
7 the FTD Fund's favor in the event that loans paid off prior to the closing of the sale, the FTD  
8 Fund Committee believes that the highest market price for the First Trust Deed Fund Assets  
9 would be realized in such an auction and sale process.

10  
11 **B. The Proposed Auction and Sale Benefits All of the Debtors'**  
12 **Constituents.**

13 As described in more detail above, the Debtors propose to auction the First Trust  
14 Deed Fund Assets and the post-Closing servicing rights of USACM. Nevertheless, the proposed  
15 sale and auction process provides substantial benefits to each of the Debtors and all of their  
16 constituents other than the DTD Fund who, due to the uncertainties associated with the majority  
17 of the loans in its fund, has elected to pursue the collection of its loans separately from the other  
18 Debtors.

19 Regardless of whose assets are being sold, all of the constituencies in these cases,  
20 including the Direct Lenders, will benefit greatly from the proposed auction and sale process.  
21 First, all Direct Lenders will be assured that their loan servicing agreements will be transferred to  
22 a qualified loan servicer who has a vested interest in collecting the loans and is not requiring an  
23 upfront advance of collection costs. A prerequisite for a potential bidder ("Potential Bidder") to  
24 participate in the auction process includes the submission of not only written evidence of its  
25 financial ability to close the sale, but also written evidence of evidence of its qualifications to act  
26 as a loan servicer and its ability to perform the obligations under the Loan Servicing Agreements.  
27 No sale transaction will be approved unless the proposed loan servicer is qualified to service the  
28 USACM loan portfolio. Moreover, direct lenders will now have the benefit of having a loan  
servicer who has a vested interest in more than a third of the loans as the loan servicer is

1 expected to own the FTD Fund's portfolio of partial interests in loans. Finally, by consummating  
2 the sale through a plan on the proposed timetable, the Debtors' estates will relieve themselves of  
3 the enormous administrative burden of these cases. Once these assets are sold and the loan  
4 servicing rights are transferred to a third party, the Debtors' estates will cease to incur the costs  
5 of the Debtors' professionals, which have been, to date, accruing at more than \$1 million per  
6 month. There is no question that the sale transaction benefits all constituencies by bringing these  
7 cases to as rapid a close as possible.

8 **C. The Structure of the Stalking Horse Bid Will Ensure that the Debtors**  
9 **Maximize the Value of Their Collective Assets.**

10 As described further below, the First Trust Deed Fund Assets and Commercial  
11 Mortgage Assets are being sold together as one package. Silver Point's stalking horse bid is  
12 representative of, and favorable to, the other bids that the Debtors received in that Silver Point  
13 expressed an interest in purchasing the loan servicing rights, along with all fractional interests in  
14 loans that were available (which turned out to be only the FTD Fund loan portfolio for the  
15 reasons described above). The market place has recognized that a synergy exists in purchasing  
16 these assets together as potential bidders have expressed a belief that the whole is greater than  
17 the sum of the parts due to the considerable collection costs that are required to monetize all of  
18 the remaining loans. Indeed, Silver Point, and nearly all of the other identified bidders have  
19 expressed a desire to purchase MORE of the Debtors' excluded assets. Due to the numerous  
20 fractional interests in each loan and the likelihood that most, if not all, of the collection costs will  
21 need to be advanced by the servicer, the only bids received that provided material value to both  
22 the FTD Fund and the USACM estate were those offers that conditioned their offers on acquiring  
23 both the servicing rights and the FTD Fund loans so that the upfront cash needs of the purchaser  
24 for collection remedies could be initially subsidized by the collections on the FTD Fund loans.

25 While the FTD Fund Committee understands that the Debtors have received some  
26 inquiries from loan servicers to "purchase" just the rights of loan servicing, both before and after  
27 receiving the initial bid of Silver Point, the FTD Fund believes that none have offered to  
28 purchase the servicing rights on the same or better terms than those offered by Silver Point. In  
fact, none of the offers for servicing rights presented to the FTD Fund Committee exceeded the

1 book amount of accrued but unpaid servicing fees. As a result of marketing the Debtors' assets  
 2 prior to the selection of the Silver Point, it is the understanding of the FTD Fund Committee that  
 3 the Debtors believed it was in the interests of the Debtors' estates to sell these assets jointly. The  
 4 Debtors, however, have left open in the bid procedures the possibility of a joint bid by a loan  
 5 servicer, who would acquire just the loan servicing rights, and another party, who would acquire  
 6 the FTD Fund loan portfolio. Nevertheless, the Debtors believe that marketing the assets  
 7 together will provide the greatest return to both the USACM and FTD Fund estates, and proposes  
 8 to auction these assets together in response to the considerations raised in the marketplace.

#### 9 IV.

#### 10 **THE BID PROCEDURES, INCLUDING THE BREAK-UP FEE, WILL ENCOURAGE** 11 **BIDDING**

12 At the hearing on October 19, 2006, the Court expressed several concerns about  
 13 the bid procedures negotiated by the parties. These concerns include why the Debtors are  
 14 proposing to sell the First Trust Deed Fund Assets and USACM's loan servicing rights in one  
 15 package and the necessity and amount of the Break-Up Fee. The FTD Fund Committee believes  
 16 that the Bid Procedures will function to maximize value for all of the estates.

#### 17 **A. The Bid Procedures Provide for Uniformity and Transparency in the** 18 **Bidding Process and Ensure that No Single Debtor Will Be Favored Over** 19 **Other Debtors.**

20 The Debtors and the Official Committees worked diligently with Silver Point to  
 21 craft straightforward, transparent procedures that will encourage competitive bidding at the  
 22 Auction by entities qualified to service loans and with the financial capability to close an  
 23 acquisition transaction. In order for Potential Bidders to perform due diligence and examine the  
 24 Assets, Potential Bidders must show, among things, that they are both financially qualified to  
 25 consummate the transaction and qualified to service loans. Once Potential Bidders have satisfied  
 26 the Preliminary Qualifications, they are given more than a sufficient amount of time to submit  
 27 Qualified Bids. Thus, the Bid Procedures serve to filter out Potential Bidders who are unsuitable  
 28 to act as loan servicers or who are not otherwise financially capable of closing the sale, while at  
 the same time welcoming those Potential Bidders who are qualified to service loans and do have  
 the financial wherewithal to close the transaction to participate in the sale process.

1           The Bid Procedures contemplate a sale of the First Trust Deed Fund Assets along  
 2 with USACM's servicing rights because the Debtors and the Committees have determined that  
 3 the value is maximized through a combined sale. As discussed above, there have been no  
 4 expressions of interest for the servicing rights alone in excess of the Silver Point offer and when  
 5 marketed alone, the First Trust Deed Fund Assets may lose a substantial portion t of their value.  
 6 Given these facts, the Bid Procedures provide for a joint sale that ensures that neither the FTD  
 7 Fund nor USACM will be favored over one another by Potential Bidders. Potential Bidders  
 8 cannot collude with one Debtor or Official Committee to the detriment of the other Debtor  
 9 because there is a single purchase price for the Property and the purchase allocation is left to the  
 10 estates and not the Potential Bidders. If the sale of such assets was not linked, Potential Bidders  
 11 could attempt to pit the FTD Fund against USACM to create a situation in which the price of  
 12 either or both of the First Trust Deed Fund Assets and USACM's servicing rights are driven  
 13 down. Both estates benefit from the sale of their assets in a combined package.

14           The parties realize that they must address how to allocate the overbids for the  
 15 Property, but they view this issue as simply another issue to be dealt with in the context of a  
 16 global settlement under the Plan. The FTD Fund Committee firmly believes that many of the yet  
 17 to be resolved issues in the Chapter 11 Cases, from professional fee allocation to payment of  
 18 servicing and management fees to allocation of an overbid at the Auction are interrelated and are  
 19 best addressed at once with all relevant parties participating in the resolution process. If the FTD  
 20 Fund (or any of the estates) are forced to resolve these economic issues in a piecemeal fashion,  
 21 they will not maximize value for their constituencies. The parties have made substantial effort  
 22 and significant progress working towards a global resolution of these cases to be incorporated  
 23 into a plan of reorganization and the FTD Fund Committee is optimistic that a global settlement  
 24 is near.

25           **B. The Break-Up Fee, Which Is Supported by the Debtors and the Official**  
 26           **Committees, Is Necessary and Is in the Best Interests of the Debtors' Estates**  
 27           **and Their Constituencies.**

28           As set forth in detail in the Bid Procedures Motion and the Debtors' reply (the  
 "Bid Procedures Reply") to the opposition of Capital Crossing Bank to the Bid Procedures

1 Motion, the Break-Up Fee is necessary and appropriate in the Chapter 11 Cases. All of the  
 2 Official Committees strongly support the Break-Up Fee. Additionally, the FTD Fund  
 3 Committee, like the Debtors, believes that had the parties not agreed to the Break-Up Fee, Silver  
 4 Point (nor any of the other potential bidders) would not have executed the Agreement and there  
 5 would not be a stalking horse bidder for the Property.

6 The Break-Up Fee is primarily payable upon closing of the sale of the Property to  
 7 a Successful Bidder and that the Break-Up Fee is to be paid by the Successful Bidder, not the  
 8 Debtors' estates. As such, the Debtors' estates will not pay the Break-Up Fee from estate assets.<sup>7</sup>  
 9 Indeed, because the Bid Procedures couple the Break-Up Fee with a specific initial overbid  
 10 increment that pays the Break-Up Fee and Expense Reimbursement in full, the estates are further  
 11 ahead on a net/net basis even after paying the Break Up Fee.

12 Moreover, to the best of the FTD Fund Committee's knowledge, no bidder who  
 13 approached the Debtors offered to become the stalking horse bidder without a break-up fee.  
 14 Indeed, not only was Silver Point's proposed break-up fee less than that of other bidders, but the  
 15 Debtors and the FTD Fund Committee were successful in negotiating Silver Point's break-up fee  
 16 down significantly to its current proposed level.

17 The FTD Fund Committee believes that the Break Up Fee creates value for these  
 18 estates. First, an Auction with a committed Stalking Horse is the only way the FTD Fund  
 19 Committee will go forward with a sale—a floor on the sale price allows the FTD Fund  
 20 Committee, as fiduciaries, to embrace the sale process and eliminates the uncertainty associated  
 21 with selling the assets relative to continuing to workout the loans on a standalone basis. Without  
 22 a Break Up Fee, no buyer was willing to complete its due diligence and give a binding offer that  
 23 provided that floor and then be subject to overbid. In fact, based on the increased activity and  
 24 interest in the purchase of the various assets, it appears that the terms of the Silver Point purchase  
 25 offer have increased the interest in the assets rather than create an impediment towards obtaining  
 26

27 <sup>7</sup> The only other instance in which the Break-Up Fee would be payable is if the parties are  
 28 unable to close the transaction by the Outside Approval Date, which date is 120 days from  
 October 19, 2006, and within nine months of such date the Property is sold to a third party  
 for a price equal to or greater than the APA purchase price.

1 higher and better offers.

2 V.

3 **AN AUCTION PROCESS FOLLOWED BY PLAN CONFIRMATION IS IN THE BEST**  
 4 **INTERESTS OF THE DEBTORS' ESTATES**

5 **A. Proposed Timing to Exit These Chapter 11 Cases.**

6 The FTD Fund Committee believes that the proposed sale is the best means by  
 7 which to reach a global resolution to the Chapter 11 Cases and, thereby, achieve finality for FTD  
 8 Fund members while at once stemming the mounting professional fees necessary to administer  
 9 the Chapter 11 Cases. Accordingly, the Debtors have worked with the Committees and Silver  
 10 Point to craft a timeline, incorporated into the Offer Letter and APA, for implementing the sale  
 11 and plan confirmation process that will expeditiously conclude the Chapter 11 Cases while  
 12 maximizing the value of the Debtors' estates. The key remaining dates of the proposed timeline  
 13 are as follows:

- 14 • **November 6, 2006:** Deadline for order approving the Bid Procedures Motion  
 15 to become a final, non-appealable order (must occur no later than 55 days  
 16 after execution of the Offer Letter). If this condition is not met, pursuant to  
 17 the APA, Silver Point shall be deemed to have rescinded the Offer Letter.
- 18 • **November 13, 2006:** Hearing on approval of the Disclosure Statement.
- 19 • **November 30, 2006:** Deadline to submit Qualified Bids (one week prior to  
 20 the Auction). This assumes that the Auction is held on December 7, 2006.
- 21 • **December 7, 2006:** The proposed date of the Auction.
- 22 • **December 15, 2006:** The proposed hearing date on Plan confirmation.
- 23 • **December 26, 2006:** Earliest date by which an order confirming the Plan may  
 24 become a final, non-appealable order and, in turn, closing of the sale may  
 25 occur (assumes that a confirmation order is entered on December 15, 2006).
- 26 • **February 5, 2006:** Deadline for entry of order confirming the Plan without  
 27 violating the Outside Approval Date (see below).
- 28 • **February 16, 2006:** The Outside Approval Date.<sup>8</sup> If the Plan is not

8 The Outside Approval Date is 120 days from the Due Diligence Completion date, which is  
 October 19, 2006. Because 120 days from October 19, 2006 is Saturday, February 17, 2007,  
 this timeline adopts Friday, February 16, 2007 as the Outside Approval Date out of an  
 abundance of caution.

1 confirmed by a final, non-appealable order of the Bankruptcy Court as of this  
2 date, Silver Point shall be released from any further obligation to perform  
3 pursuant to the Offer Letter or the Plan. So long as Silver Point is not in  
4 breach of the Asset Purchase Agreement on this date, Silver Point is entitled  
5 to the Expense Reimbursement (subject to Bankruptcy Court approval of the  
6 Bid Procedures).

7 If implemented, this aggressive timeline will result in the Debtors' emerging from  
8 chapter 11 around the New Year. At such time, creditors, Direct Lenders, and Fund members  
9 will be free of the constraints and burdens of being mired in bankruptcy and will be able to move  
10 forward in accordance with the Plan. FTD Fund members will receive a substantial amount of  
11 their initial investments in the FTD Fund, while Direct Lenders will be ensured that their loans  
12 will continue to be serviced by a qualified entity and DTD Fund members may focus their efforts  
13 of their ongoing collection efforts without any distractions from the administration of these  
14 chapter 11 cases. USACM creditors will receive consideration from the sale transaction, as well  
15 as other assets they are retaining that will be liquidated over time without bearing the enormous  
16 cost of compensating a reorganization professional to operate the USACM servicing operations.  
17 Indeed, all creditors, Direct Lenders, and Fund members will no longer have to bear the burden  
18 paying professionals fees the numerous law firms and financial advisors that are necessary so  
19 long as the estates remain in chapter 11.

20 In addition, the Debtors and Committees believe that the nature of the assets  
21 mandates that the auction, which will lock-up the successful bidder in a relatively short  
22 timeframe, be held prior to the plan confirmation process. As emphasized above, this case  
23 centers on a portfolio of 93 loans. These are relatively short-term loans that have a term of 1 to 5  
24 years, with many of the loans maturing in the coming months. Moreover, over one- half of these  
25 loans are non-performing. As non-performing loans are more expensive to service since they  
26 require initial outlays of capital to fund collection efforts and foreclosure costs, it is critical that  
27 the loan service agreements are transferred at a time when the Debtors transfer the rights to  
28 service both performing and non-performing loans. Further, delay may deplete the numbers of  
potential servicing entities interested in the sale transaction as such entities may not want to be  
obligated to provide a significant capital outlay with only a delayed return expected, if any. In

1 addition, it is also critical that the FTD Fund sell its loan portfolio quickly as the attempts by the  
2 DTD Fund and USACM to sell their interests demonstrate that not much of a market exists for  
3 either non-performing loans or a small portfolio of fractional interests in loans. As delay will  
4 only hinder efforts to maximize value for these assets, it is crucial that USACM and FTD Fund  
5 land a stalking horse buyer as soon as possible.

6 Furthermore, the sale is expressly linked to confirmation of a plan of  
7 reorganization, which will ensure that the sale takes place inside the context of a plan that offers  
8 a global resolution to these cases. As outlined below, alternative strategies are simply not  
9 feasible or offer inferior solutions.

10 **B. A 363(b) Sale Outside of a Plan of Reorganization Fails to Offer a**  
11 **Global Solution to these Cases.**

12 While conducting a sale under section 363(b) of the Bankruptcy Code (a "363(b)  
13 Sale") is often preferable to selling assets under a plan, such is not the case here, where the  
14 Debtors and the Committees are attempting to employ an asset sale as part of a global resolution  
15 through a Plan, in accordance with the policies of the Bankruptcy Code.

16 While the parties considered effecting the sale of the Property through a 363(b)  
17 Sale, the parties concluded that the Court and other parties-in-interest would view such a sale as  
18 an effort to disenfranchise constituencies from the plan process. Only a plan gives the Direct  
19 Lenders (who contend they are not creditors) and the members of the FTD Fund and the DTD  
20 Fund (equity) a meaningful understanding of what they will get at the end of the day, how they  
21 will get it and, more importantly, established procedures for letting their desires be known –  
22 either through voting on the Plan or objecting to confirmation. Furthermore, conducting a sale of  
23 the First Trust Deed Fund Assets pursuant to section 363(b) of the Bankruptcy Code rather than  
24 through the plan confirmation process would undermine the goal of the Debtors and the Official  
25 Committees to resolve as many issues as possible at once so as to curb the increasing costs of the  
26 Chapter 11 Cases and maximize the value of all five Debtor estates. Carrying out a 363 Sale to  
27 be followed perhaps months later by plan confirmation would needlessly prolong the Chapter 11  
28 Cases and, as such, would cost additional millions of dollars in professional fees while  
continuing to leave creditors, Direct Lenders, and fund members mired in uncertainty.

Moreover, carving out the sale of the First Trust Deed Fund Assets from the plan process would simply create another hurdle to achieving plan confirmation: if the First Trust Deed Fund Assets are liquidated through a 363(b) Sale, the FTD Fund estate will hold the proceeds of the sale but will have no mechanism by which to distribute such proceeds until a plan is confirmed. Further, the liquidation of the First Trust Deed Fund Assets without a negotiated plan would cause litigation among the estates as each estate reaches for a share of the liquidated First Trust Deed Fund Assets on account of asserted intercompany claims – these estate disputes only are resolved completely through a global resolution under a plan. A 363 Sale in a vacuum results only in the partial resolution of the issues of a sole estate, while the four other Debtors must continue to determine their chapter 11 exit strategies.

In stark contrast, selling the First Trust Deed Fund Assets through the plan will ensure that the Bankruptcy Code's plan protections are not eviscerated with respect to the FTD Fund, while simultaneously allowing the Debtors to expeditiously bring closure to the Chapter 11 Cases in a manner that maximizes the value of all of the Debtors' estates.

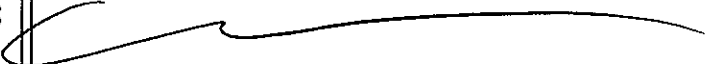
**C. Requiring that the Plan Confirmation Process Precede the Auction Will Hinder The Marketing of the Debtors' Assets and Chill Bidding.**

At the October 19th hearing, the Court expressed concern for proceeding with the auction prior to the plan confirmation process due to the perceived risk that the FTD Fund investors may not elect to vote in favor of the sale transaction, which would then trigger the expense reimbursement obligation to Silver Point. As explained above, it is essential that the Debtors lock-up the successful bidder as quickly as possible. As fewer performing loans remain available for sale, there will be less interest from potential overbidders, which will reduce any value to be generated through the auction process. Moreover, the FTD Fund Committee has little confidence that the Debtors would be able to secure a stalking horse that is willing to wait the necessary time for the Debtors to obtain approval of a disclosure statement, solicit acceptances on a plan, and obtain plan confirmation. Under the Debtors' already very aggressive timeline, the earliest that a plan could be confirmed, pursuant to a final order, is the end of December 2006. However, under this scenario the auction takes place in early December, giving the stalking horse (as well as potential overbidders) some sense of certainty before the close of

1 this year. If forced to have the plan confirmation process precede the auction, it is most likely  
 2 that the earliest a sale could close is some time in February 2007 (or later) – a seven month wait  
 3 to acquire the purchased assets is extensive even in the bankruptcy setting. The FTD Fund  
 4 Committee believes that given the nature of the estates' assets, it is simply unrealistic that any  
 5 potential bidder would commit to being a stalking horse bidder (which is entitled to no guarantee  
 6 that it will ultimately acquire the assets) for such a long period of time without any further  
 7 assurances from the Debtors or the Court. It is one thing to lock up \$46 million in credit with the  
 8 certainty that it will be used for its intended purpose, but it is another thing to lock up \$46  
 9 million for only the chance to buy the Debtors' assets. Delaying the auction until after the Plan  
 10 confirmation is likely to result in no sale transaction – not due to the lack of votes by the FTD  
 11 Fund members, but rather because there will no longer be a purchaser for the First Trust Deed  
 12 Fund Assets. For these reasons, the FTD Fund Committee fully supports the process of  
 13 conducting the auction prior to the plan confirmation process.

#### 14 CONCLUSION

15 For the reasons set forth herein, as well as in the Bid Procedures Motion and the  
 16 Bid Procedures Reply, the FTD Fund Committee respectfully requests that the Court grant the  
 17 relief requested in the Bid Procedures Motion.

18   
 19 \_\_\_\_\_  
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